

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION**

DOUGLAS GENE MAYBERRY)	
)	
Plaintiff,)	
v.)	CIV. ACT. NO. 3:06cv841-TMH
)	
UNITED STATES OF AMERICA,)	
)	
Defendant.)	

ORDER

Before the court are Defendant Douglas Gene Mayberry's notice of appeal (Doc. No. 7), which the court construes as containing a motion for certificate of appealability, and Mayberry's motion for leave to appeal *in forma pauperis*. (Doc. No. 8.)

28 U.S.C. § 1915(a) provides that "[a]n appeal may not be taken *in forma pauperis* if the trial court certifies in writing that it is not taken in good faith." In making this determination as to good faith, the court must use an objective standard, such as whether the appeal is "frivolous," Coppedge v. United States, 369 U.S. 438, 445 (1962), or "has no substantive merit." United States v. Bottoson, 644 F.2d 1174, 1176 (5th Cir. Unit B. May 15, 1981) (per curiam). Moreover, a certificate of appealability may issue only if the applicant "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22(b).

Applying these standards, the court is of the opinion, for the reasons stated in the recommendation of the magistrate judge (Doc. No. 3), that Mayberry's appeal is without a legal or factual basis. As stated in said recommendation, which this court adopted in a subsequent order (Doc. No. 5), in his present motion, Mayberry asserts the identical

claim he previously raised in his 28 U.S.C. § 2255 motion which he filed in this court on August 4, 2000. See U.S. v. Mayberry, Cr. No. 3:96cr51-TMH. Not only did this court find Mayberry's argument to be without merit when denying Mayberry's § 2255 motion of August 2000, but on appeal the Eleventh Circuit Court of Appeals also rejected the argument on the ground that, in a published opinion, see U.S. v. Pruitt, 174 F.3d 1215 (11th Cir. 1999), it had rejected the identical argument asserted by one of Mayberry's codefendants, Marlon Engle. Accordingly, the court finds that Mayberry's appeal is frivolous and not taken in good faith. See Rudolph v. Allen, 666 F.2d 519, 520 (11th Cir. 1982) (per curiam). Furthermore, the court finds that Mayberry has failed to make a substantial showing of the denial of a constitutional right.

Accordingly, it is CONSIDERED and ORDERED that Mayberry's motion to proceed on appeal *in forma pauperis* and motion for certificate of appealability are hereby DENIED and that the appeal in this cause is hereby certified, pursuant to 28 U.S.C. § 1915(a), as not taken in good faith.

DONE this 23rd day of January, 2007.

/s/ Truman M. Hobbs
SENIOR UNITED STATES DISTRICT JUDGE